TEE YAM HOLDINGS SDN BHD v. SHANGHAI CAPITAL SDN BHD; TENAGA NASIONAL BHD (PETITIONER)

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS J
[COMPANIES (WINDING-UP) NO: WA-28PW-556-12-2018
& WA-28NCC-6-01-2017]
30 OCTOBER 2019

COMPANY LAW: *Winding-up – Petition – Application to set aside and/or terminate winding-up order – Petitioner obtained judgment in default against company for non-payment of electricity bills – Petitioner issued statutory demand or notice for payment of judgment sum – Petitioner filed for winding-up of company following company's non-response to notice – Whether there was proper service of notice demanding payment of judgment sum – Whether notice valid – Whether winding-up order could stand – Whether winding-up order ought to be terminated and/or set aside – Companies Act 2016, s. 493(1), (2)(c) – Companies Act 1965, s. 218*

CIVIL PROCEDURE: *Service – Service of statutory demand or notice – Petitioner obtained judgment in default against company for non-payment of electricity bills – Petitioner issued statutory demand or notice for payment of judgment sum – Petitioner filed for winding-up of company following company's non-response to notice – Whether there was proper service of notice demanding payment of judgment sum – Notice not handed or left at registered office of company – Whether service of notice made through registered post good service – Whether notice valid – Whether winding-up order could stand – Companies Act 2016, s. 493(1), (2)(c) – Companies Act 1965, s. 218*

The petitioner had obtained a judgment in default against the respondent, at the Sessions Court, in the amount of RM109,276.25 ('sum'), following the respondent's non-payment of electricity bills. The petitioner then issued a statutory demand or notice under s. 218 of the Companies Act 1965 ('CA 1965'), demanding payment of the said sum ('notice'). When the respondent did not respond to the notice, the petitioner proceeded to present a petition to wind up the respondent. Since there was no opposition by the respondent, it was accordingly wound up ('winding-up order'). However, more than one and a half year later, the applicant, the contributory of the respondent, filed the present application pursuant to s. 493(1) and (2)(c) of the CA 2016, to terminate and/or set aside the winding-up order ('application'). In support of the application, the applicant and the respondent submitted that (i) the service of the notice was defective because there was no demand handed or left at the registered office of the respondent; (ii) since there was no proper service, the notice was null and void and the winding-up order must then be terminated and/or set aside; (iii) there was

A no debt owed by the respondent to the petitioner and, therefore, the demand and the subsequent winding-up order should not have been granted; and (iv) the electricity supplied to the property was not utilised as the respondent was not occupying the property, having sold off the same. Objecting to the application, the petitioner argued that (i) even if the service of the notice was
B made through registered post, it was still good service; (ii) the application had not satisfied some principles that merited the termination of the winding-up order; and (iii) the respondent and the applicant failed to show justifiable reasons to allow the application.

Held (dismissing application with costs):

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(1) The provisions of s. 493(1) and (2)(c) of the CA 2016 are in respect of termination of the winding-up order. It is not in respect of the setting aside of the same *per se*. Therefore, these provisions could not be used to set aside the winding-up order. The respondent and the applicant were too cautious in the application; there was no real need for the setting
D aside of the order if the same is terminated. The termination of the winding-up order would have been sufficient as it carried with it the effect of setting aside the order too. The setting aside requested was redundant *vis-a-vis* the termination applied. (paras 12 & 13)

E **(2)** A demand could be served by way of a registered post to the respondent and there was no necessity for the same to be physically left or handed at the respondent's registered office by personal service. Hence, the contention by the respondent and the applicant on this issue was wrong. The service by the petitioner must be considered a good service. The registered post has the effect that the notice was left and handed over at
F the registered office of the respondent upon delivery of the same. Furthermore, there was no denial by the respondent and the applicant that there was non-acceptance or non-delivery of the registered post. Therefore, the notice was not defective. Consequently, the notice could stand to be the basis for the winding-up petition. (paras 18, 23, 24 & 48)

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(3) The respondent and the applicant did not satisfy the principles that would warrant the application. The solvency of the respondent was in doubt as there was no proof whether there were other creditors and whether the creditors have been paid in full. The failure to file the statement of affairs of the respondent within time to the liquidator also
H meant that there was no information as to the status of the respondent, particularly on its assets, debts and liabilities. This information was needed to determine the solvency of the respondent. In its absence, the respondent could not be said to be solvent. Although it was asserted by the respondent and the applicant that there was no creditor for the
I respondent, this could only be cogently accepted if the statement of affairs was filed within time. (paras 38 & 48)

(4) The argument that the electricity supplied, if any, was never utilised by the respondent, basically pertained to the merits of the case at the Sessions Court where the judgment in default had been obtained by the petitioner. That judgment was a valid judgment which had not been set aside. It was not the function of this court to question that judgment. The contentions regarding the merits of the case should have been argued at the Sessions Court. (para 44)

Case(s) referred to:

Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189 HC ***(refd)***

Rangit Singh Gurnam Singh v. Team Durable Sdn Bhd [2015] 1 LNS 1003 HC ***(refd)***

South Seas Development Ltd v. Commercial Advances Nominees Ltd [1976] 1 NZLR 679 ***(refd)***

Teguh Amani Sdn Bhd v. Yongvic Sdn Bhd [2017] 1 LNS 63 HC ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

United Merchant Finance Bhd v. Magpie Resources Sdn Bhd [2001] 5 CLJ 464 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Weidaya Sdn Bhd v. DND Bina Holdings Sdn Bhd [2007] 1 LNS 142 HC ***(refd)***

Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd [1994] 3 CLJ 511 HC ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, r. 24

Companies Act 1965 (repealed), ss. 218(2)(a), 243(1), 355(1), (2)

Companies Act 2016, ss. 466(1), 484(3), (6), 493(1), (2)(c)

For the respondent & applicant - Chew Chang Min, Mary Ann Oii, Jenny Fong, Aqilah Rossidi & Gan Jer Nynn

For the petitioner - Carole Ngu; M/s OS Kim & Assocs

For the official receiver - Subri Hashim; M/s LY Lu & Co

Reported by Najib Tamby

JUDGMENT

Abu Bakar Jais J:

Introduction

[1] This written grounds of judgment relates to the respondent cum company and applicant application to terminate and/or set aside the winding-up order made against the respondent ('application'). The applicant is the contributory of the respondent.

Brief Facts

[2] The respondent was wound up on 3 March 2017, pursuant to the petition filed by the petitioner. There was no opposition from the respondent when it was wound-up.

[3] The application was filed on 2 December 2018, more than one and a half year after the winding-up.

[4] The respondent was wound up pursuant to the statutory demand or notice given by the petitioner under s. 218 of the Companies Act 1965 ("CA"). This notice was issued demanding payment based on a judgment in default obtained by the petitioner at the Sessions Court against the respondent for the sum of RM109,276.25. Since there was no response from the respondent regarding this notice, a petition to wind up the same was filed by the petitioner. As stated, the respondent did not contest this petition. As such, the court ordered the winding-up of the respondent.

[5] The court judgment supporting the notice and petition is based on claim of non-payment of electricity bills issued by the petitioner to the respondent for the use of electricity at the respondent's premises ("property").

Summary Of The Respondent's And Applicant's Contentions

[6] The petition should not have been allowed as there is defective service of the statutory notice pursuant to s. 218 of the CA from the petitioner to the respondent. The service is defective as there was no demand handed or left at the registered office of the respondent. (Stated in paras. 10 and 11 of the respondent's and applicant's affidavit). Since there is no proper service of the statutory notice, the same is null and void. Therefore the winding-up order must be terminated and/or set aside.

[7] There is also no debt owed by the respondent to the petitioner and therefore the demand and subsequent winding-up order should not have been granted.

[8] The property had been sold off at all material time and the respondent was not occupying the same. Hence the electricity supplied if any was never utilised by the respondent.

Summary Of The Petitioner's Contentions

[9] Even if the service of the notice pursuant to s. 218 of the CA was made through registered post, it is still good service of the same.

[10] The application has not satisfied some principles that merit the termination of the winding-up order.

[11] The respondent and applicant failed to show justifiable reasons to allow the application.

Court's Findings

Governing Provision

[12] First, it is undisputed that the application is filed pursuant to s. 493(1) and (2)(c) of the Companies Act 2016 ("CA 2016") that state as follows:

> 493(1)
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> At any time after an order for winding-up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up of the company ought to be terminated, make an order terminating the winding-up of the company as the Court thinks fit.
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> 493(2)(c)
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> In making an order under subsection (1), the Court may take into consideration, but not limited to, the following facts:
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> ...
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> ...
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> other facts that the Court considers appropriate.

[13] In respect of the above provisions, there is no doubt that the same are with respect of termination of the winding-up order. It is not in respect of the setting aside of the same *per se*. Therefore these provisions cannot be used to set aside the order which is also an application in this case as pointed out earlier. Hence a termination of the winding-up order could be requested but not the setting aside of the same based on the provisions above. The respondent and the applicant had simply been too cautious in this application as there is no real need for the setting aside of the order if the same is terminated. The termination of the order would have been sufficient as it carries with it the effect of setting aside the order too. The setting aside requested is redundant *vis-a-vis* the termination applied. In fact the provisions in the present CA 2016 do not provide a setting aside of winding-up order but only termination of the same.

Service Of The Notice Of Demand

[14] As the issue of service of the statutory demand is crucial in the application, there is the need to look at the provision of s. 218(2)(a) of CA in respect of service of the notice. The equipollent of the same presently is s. 466(1) of the present CA 2016. The former states as follows:

> A company shall be deemed to be unable to pay its debts if a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by **leaving at the registered office a demand under his hand or under the hand**

> **of his agent thereunto lawfully authorised** requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.
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> (emphasis added)

[15] The vital words in the above provision pertaining to service of the demand are "leaving at the registered office a demand ..." Hence what is the meaning of "leaving at the registered office"? In the context of the present case based on contentions of the parties, does it mean the notice must be left or handed over at the registered office requiring a physically action and personal service or can the notice merely be sent by a registered post?

[16] Having considered the foregoing, even if the notice is sent through registered post, it would not be easy to contend that the notice was not left at the respondent's registered office. The sending of the notice by registered post would still mean the same is left at the respondent registered office upon delivery of the same. In this case, it is not contended by the respondent and applicant that the postal service had not delivered the notice by registered post.

[17] In *Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511 it was decided that service of the demand by registered post to the company was considered good service without the need to leave the same physically or personal service at the company registered office. Quoting the New Zealand's case of *South Seas Development Ltd v. Commercial Advances Nominees Ltd* [1976] 1 NZLR 679 Abdul Malek bin Haji Ahmad J in this case said as follows:

> The New Zealand Court of Appeal in the *South Seas* case went further to hold that proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company could be effective service within the terms of s. 218(a) of the New Zealand Companies Act 1955 (similar to s. 218(2)(a) of the Act) as what was important was the adequate proof of physical delivery by the creditor. This was satisfied in the present case as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. Accordingly, the Court overruled the first objection.

[18] This case proves that the demand can be served by way of a registered post to the respondent and there is no necessity for the same to be physically left or handed at the respondent's registered office by personal service. Hence, with respect the respondent's and applicant's contention on this issue is wrong. The service must be considered a good service by the petitioner.

[19] In the case of *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189 it was said an irregularity could be waived by the court in exercising its wide discretion. As what is of importance is whether the company is able to pay its debt.

[20] In the case of *Rangit Singh Gurnam Singh v. Team Durable Sdn Bhd* [2015] 1 LNS 1003 it is said as follows:

> Further, as to the mode of service, s. 350 CA 1965 states that a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

[21] In the case of *United Merchant Finance Bhd v. Magpie Resources Sdn Bhd* [2001] 5 CLJ 464 it is held as follows:

> The service of a s. 218 notice by A.R. registered post to the respondent's registered office was in fact actual delivery of the said notice to the respondent's registered office and thus should be accepted as good service of the said notice. Therefore, s. 218(2)(a) of the Act was complied with.

[22] In the case of *Teguh Amani Sdn Bhd v. Yongvic Sdn Bhd* [2017] 1 LNS 63 my learned brother Vazeer Alam Mydin Meera J explained the position clearly why a registered post is considered good service where it is said as follows:

> I fully agree with the reasoning and observation of my learned brother Abdul Malek J (as then was) in *Weng Wah Construction Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511; [1994] 2 MLJ 266 HC, where in dismissing a similar preliminary objection, he applied the pronouncement of the New Zealand Court of Appeal in *South Seas Development Ltd v. Commercial Advances Nominees Ltd* [1976] 1 NZLR 679, where in construing whether the service of a statutory notice of demand under s. 218(a) of the New Zealand Companies Act 1955, which is similar to ours, by way of registered post is proper service, it had held that proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company is effective service within the terms of s. 218(a) of the New Zealand Act as what is important is adequate proof of physical delivery of the notice by the creditor.
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> I have no hesitation in saying that that should be so. The words "served on the company by leaving at the registered office" in s. 218(2)(a) of the Companies Act does not mean that it has to be personal service of the notice. I would construe these words to mean that the notice can be left at the registered office by a postal worker or courier just as it may be left at the registered office by a solicitor's dispatch clerk or the petitioner's employee, servant or agent. The petitioner company would have to use someone to deliver or leave the notice at the respondent's registered address. Why should it not be the postal service worker? To my mind adequate proof of physical delivery of the notice is more important than the mode by which it is done. In any event, Rule 18 of the Companies (Winding Up) Rules 1972 in respect of service of notices states that:
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> Except as otherwise provided by the Act or these Rules or any order:
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> (a) all notices, summonses and other documents except those of which personal service is required shall be deemed to be sufficiently served if left at or sent by prepaid post to the last known address of the

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> person to be served therewith or the address (if any) at which the person has authorised service on him to be effected; and the notice, summons or document if so sent by prepaid post shall be considered as served at the time that the same ought to be delivered in the ordinary course of post and notwithstanding the same may be returned by the post office;

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> And as I had said earlier, since s. 218(2)(a) does not require personal service of the notice, the provisions of Rule 18 would apply and service by A.R. Registered Post is valid and effective service in law.

[23] All these cases cited above would mean that the notice of demand C could be served by registered post and not necessarily by leaving the same physically at the respondent's registered office. The registered post too has the effect that the notice is left and handed over at the registered office of the respondent upon delivery of the same.

[24] There is also no denial by the respondent and applicant that there was D non-acceptance or non-delivery of the registered post. Hence, for all practical purposes, the notice of demand had been left, handed and served at the respondent's registered office. Therefore the notice is not defective.

[25] To take it further, even if the notice is irregular in its service, the provisions of s. 355(1) and (2) of the CA state as follows:

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> s. 355
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> (1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

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> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

[26] Following the above provisions, there can be no injustice as it was G never contended that the notice sent by registered post was never received nor the same was never delivered by the postal service.

[27] The above provisions were applied in the case of *Weidaya Sdn Bhd v. DND Bina Holdings Sdn Bhd* [2007] 1 LNS 142 where it is said as follows:

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> In my view, the real issue which the winding-up court will like to know is whether the company is able to pay the money notwithstanding the fact that there are irregularities in the statutory demand or compliance of the provisions of the CA 1965. This is so because all such irregularities can be condoned if the court so wants, pursuant to section 355(1) and (2) CA 1965.

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Stay And Termination

[28] The termination of winding-up order is requested under the present CA 2016. There is no termination under the previous CA. What was available in the CA is an order of a permanent stay of the winding-up. But this is not requested in this case. Nonetheless, it is wise to take note of the law on permanent stay order as it carries the same effect of an order of termination. In both cases either for the permanent stay or the termination, this would mean the winding-up order is no longer effective and therefore ceased to be enforced in any manner whatsoever.

[29] The relevant provision regarding stay under the CA is s. 243(1) that states:

> At any time after an order for winding-up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, **make an order staying the proceedings either altogether** or for a limited time on such terms and conditions as the Court thinks fit.
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> (emphasis added)

[30] In this regard, the Federal Court in the case of *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709 pointed out when a stay should be granted and said as follows:

> In summary, the principles which emerge from the above authorities are these:
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> 1. The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
> 2. The attitude of the creditors, contributories and the liquidator is a relevant consideration.
> 3. That in exercising its discretion, the Court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
> 4. Last, and which by no means least, is that stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

[31] First, the principles listed above by the Federal Court are just instances when a stay and this regard termination must not be granted. It is not supposed to be exhaustive and the four principles are not conjunctive.

[32] Having regard to the principles laid down in the above case, it is wise to consider each principle separately and see whether the respondent and the applicant had met the principles.

[33] First as stated, the court has the discretion whether a stay or termination ought to be granted and the respondent and the applicant must show a positive or sufficient case to be granted the same. This court does not think that there is a positive or sufficient case to grant the stay or termination as it is proven as explained that the notice pursuant to s. 218 of the CA has been served to the respondent.

[34] On the second principle regarding the attitude of the creditors, contributories and the liquidator, this court has been informed by the official receiver as the liquidator that the respondent had failed to file its statement of affairs within 14 days after the winding-up was ordered, a requirement stated in s. 484(3) of the CA 2016 and at para. 8 of the liquidator's report dated 10 January 2019, it is stated that none of the directors of the respondent came for the meeting called by the liquidator. Therefore, this court is of the view that the conduct of the respondent does not assist to merit a stay or termination of the winding-up order.

[35] On the third principle, this court is of the opinion that as there has been good service of the notice and taking note of the conduct of the respondent as explained, it is not conducive and detrimental to commercial morality and to the interests of the public at large if the winding-up is lifted. A company legitimately wound up for good reasons should not be resurrected as this is not consistent to commercial morality and indeed does not serve the interest of the public. If it cannot pay its debt, there is no reason to see it still operating.

[36] On the fourth principle, as stated, it is a fact that the respondent failed to file the statement of affairs within the stipulated time. And s. 484(6) of the CA 2016 makes this an offence, liable on conviction to imprisonment or to a fine or both. Therefore this needs investigation.

[37] In the case of *Ting Yuk Kiong v. Mawar Biru Sdn Bhd& Anor* [1995] 3 CLJ 136 principles for a stay of the winding-up order were also laid down as follows:

> Under the law therefore the granting of a stay of further proceedings of the winding-up is a discretionary matter for the Court and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion the Court has to consider certain factors and would act on certain principles which have been established by decided cases. In *Re Warbler Pty Ltd* [1982] 6 ACLR 526 the following principles are enumerated:
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> (a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co. Ltd* [1975].

(b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barrule State Quarry Co.* [1969] LR 8 Eq. 688, *Re Bank of Queensland Ltd.* [1870] 2 QS CR 113 referred to).

(c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. *Krextile Holdings Pty Ltd. v. Widdows* [1974] VR 689 at 694; *Re Dalta Homes Pty Ltd.* [1972] 2 NSWLR 22 at 26 referred to).

(d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co. Ltd.* referred to).

(e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding-up is sought. (*Re a Private company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd.* [1970] VR 593 at 598 referred to).

(f) If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd.* [1963] 2 Ch 174 referred to).

(g) The general background and circumstances which led to the winding-up order should be explained. (*Krextile Holdings Pty Ltd. v. Widdow supra* referred to).

(h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to the "commercial morality" or the "public interest". (*Krextile Holdings Pty Ltd. v. Widdows supra*, *Re Dalta Homes Pty supra* referred to).

[38] Taking note of the principles above, in the present case, the solvency of the respondent is in doubt as there is no proof whether there are other creditors and whether these creditors have been paid in full. The failure to file the statement of affairs of the respondent within time as explained earlier to the liquidator also means there is no information as to status of the respondent particularly on its assets, debts and liabilities. This information is needed to determine the solvency of the respondent. In its absence, the respondent cannot be said to be solvent. Though it is asserted in the affidavit of the respondent and applicant there is no creditor for the respondent, this can only be cogently accepted if the statement of affairs is filed within time.

Judgment In Default, Notice Under s. 218 CA And Winding-Up Petition

[39] It is relevant to note that the respondent and applicant denied that the respondent was aware of the suit leading up to the judgment in default, the issuance of the notice under s. 218 of CA and the winding-up petition filed in court. However at para. 10, the respondent and applicant own affidavit in reply, unequivocally, it is stated the suit and judgment in default are not

material issues. Both said what is of relevance is only the service of the notice. And regarding this issue of the service of the notice, based on the case law and statutory provisions highlighted, the notice has been correctly served.

[40] In any event, it is also clear that at least for the petition to wind up the respondent as in this case, the same in law must be advertised and gazetted before hearing of the petition as expressed under r. 24 of the Companies (Winding-up) Rules 1972. Therefore, no winding-up order can be made before the advertisement and gazette. Because of this requirement, the respondent and applicant are most likely aware of this attempt in winding-up the respondent. An advertisement acts as notification to the general public and not the respondent alone. Even if the respondent is still not aware of the advertisement, it is most likely it would have been informed by others who saw the advertisement. Hence both respondent and applicant cannot plead ignorance of the winding-up order made. Consequently, both were just too late in filing this application which as stated earlier is more than one and a half years after the winding-up. It is likely that both ignored the petition to wind up the respondent and only now realised the repercussion of that action.

Creditors

[41] An important consideration in this case is whether the respondent has any creditors in its business. This is important as the case *Ting Yuk Kiong* mentioned earlier requires all creditors of the company to be informed of an application for a stay which has been explained can be equated to an application for termination of the winding-up order under the circumstances of this present case. *Ting Yuk Kiong* too as explained requires the attitude of these creditors to be taken into account.

[42] No doubt the respondent and applicant had said the respondent has no creditors. But as said earlier, the best indicator whether this is true is the statement of affairs of the respondent which was not filed within time.

Merits On The Court's Judgment

[43] As indicated the respondent and applicant argued there is also no debt owed by the respondent to the petitioner and the property had been sold off at all material time and the respondent was not occupying the same. Hence the electricity supplied if any was never utilised by the respondent.

[44] These arguments basically pertain to the merits of the case at the Sessions Court where the judgment in default had been obtained by the petitioner. That judgment is a valid judgment which has not been set aside. It is not the function of this court to question that judgment. The contentions of the respondent and the applicant regarding the merits of the case should have been argued at the Sessions Court. After all as explained, the suit is not an issue to the respondent and applicant as indicated in para. 10 of the respondent and applicant own affidavit in reply.

The Alleged Irregular Notice

[45] Gleaning the respondent and applicant own submission, it can be fairly concluded that the service of the notice under s. 218 of the CA is the sole determining factor whether the petition to wind up the respondent could stand. That essentially means whether the service of the notice is irregular or otherwise. If it is irregular, it would logically follow that the petition cannot be defended, having been premised on the irregular service of the notice. But alas, the service of the notice is indeed not irregular. It is not irregular because the case laws highlighted say that the service can be by registered post. And the statutory provisions explained too indicated such service cannot be defeated.

Statement of Affairs

[46] It should be pointed out there is a statement of affairs filed by the respondent on 8 March 2019. But this statement was filed after the date of filing of the application on 7 December 2018. It was not filed within 14 days of the winding-up order on 3 March 2017 as required by s. 484(3) of the CA 2016. There is a delay of roughly two years after the winding-up order.

[47] In fact, it is not beyond imagination that this statement of affairs was filed merely to buttress the application. Even in filing the same to support the application, the same was filed more than three months after the filing of the application itself. With respect, it showed the sloppiness on the part of the respondent on this issue.

Conclusion

[48] Based on the case law and statutory provision, the notice could not be contended as irregular. The same has been rightly served. Consequently, the notice could stand to be a basis for the winding-up petition. Further, as explained, the respondent and applicant too have not satisfied the principles that would warrant the application. Accordingly, the application must be dismissed with costs to the petitioner.